

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT LILLBURN NELSON, III,

Plaintiff,

v.

US FOODS, et. al.,

Defendants.

3:20-cv-00687-MMD-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the court is Plaintiff Robert Lillburn Nelson's, ("Nelson"), application to proceed *in forma pauperis* (ECF No. 1), and *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the court recommends that Nelson's *in forma pauperis* application (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be dismissed with prejudice.

I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1. "[T]he

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 supporting affidavit [must] state the facts as to [the] affiant's poverty with some particularity,
 2 definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation
 3 marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the benefits
 4 of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 A review of the application to proceed IFP reveals Nelson cannot pay the filing fee;
 6 therefore, the court recommends that the application (ECF No. 1) be granted.

7 **II. SCREENING STANDARD**

8 Prior to ordering service on any defendant, the Court is required to screen an *in forma*
 9 *pauperis* complaint to determine whether dismissal is appropriate under certain
 10 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
 11 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
 12 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*
 13 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.
 14 2015).

15 "[T]he court shall dismiss the case at any time if the court determines that – (A) the
 16 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
 17 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
 18 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

19 Dismissal of a complaint for failure to state a claim upon which relief may be granted
 20 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 21 tracks that language. When reviewing the adequacy of a complaint under this statute, the
 22 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*
 23 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a
 24 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
 25 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a
 26 claim."). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
 27 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The Court must accept as true the allegations, construe the pleadings in the light
 2 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v.*
 3 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints
 4 are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v.*
 5 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause
 7 of actions," it must contain factual allegations sufficient to "raise a right to relief above the
 8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
 9 must contain something more. . . than. . . a statement of facts that merely creates a suspicion
 10 [of] a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a
 11 minimum, a plaintiff should include "enough facts to state a claim to relief that is plausible
 12 on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of
 14 the complaint the action is frivolous and could not be amended to state a federal claim, or
 15 the district court lacks subject matter jurisdiction over the action. *See Cato v. United States*,
 16 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **III. SCREENING OF COMPLAINT**

18 Nelson brings this action pursuant to 42 U.S.C. § 1983, against Defendants US Foods
 19 and Bob Blankenship ("Blankenship"). (ECF No. 1-1.) Nelson's complaint is rambling,
 20 nonsensical, and filled with incomplete sentences. Dismissal on those grounds alone is
 21 appropriate. Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a
 22 short and plain statement of the claim showing that the pleader is entitled to relief, in order
 23 to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."
 24 *Twombly*, 550 U.S. at 555 (quotation and alteration omitted). It must also include "a demand
 25 for the relief sought. . . ." Fed. R. Civ. P. 8(a)(3). Here, Nelson's largely incomprehensible
 26 narrative makes it nearly impossible for the court to identify the factual or legal basis for his
 27 claims or the nature of his requested relief.

1 Additionally, 42 U.S.C. § 1983 aims “to deter state actors from using the badge of
2 their authority to deprive individuals of their federally guaranteed rights.” *Anderson v.*
3 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135,
4 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person
5 who, acting under color of state law, deprives another of his federal rights[,]” *Conn v.*
6 *Gabbert*, 526 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing
7 substantive provisions of the Constitution and federal statutes.” *Crompton v. Gates*, 947
8 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the
9 violation of a federally-protected right by (2) a person or official who acts under the color of
10 state law. *Anderson*, 451 F.3d at 1067.

11 A defendant has acted under color of state law where he or she has “exercised power
12 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed
13 with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *U.S. v.*
14 *Classic*, 313 U.S. 299, 326 (1941)). Generally, private parties are not acting under color of
15 state law. See *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). “A private individual
16 may be liable under § 1983 if she conspired or entered joint action with a state
17 actor.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir.2002). The plaintiff must show “an
18 agreement or meeting of the minds to violate constitutional rights,” and “[t]o be liable, each
19 participant in the conspiracy need not know the exact details of the plan, but each participant
20 must at least share the common objective of the conspiracy.” *Id.* (internal quotation marks
21 omitted).

22 Nelson’s only named defendants, US Foods and Blankenship, are private parties.
23 Nelson does not allege that US Foods and Blankenship were acting under the color of state
24 law when his rights were violated or that defendants conspired or entered joint action with a
25 state actor. Because Nelson is suing private parties and does not assert that they acted
26 under the color of state law, he cannot satisfy each of the required elements for relief under
27 an § 1983 action.

Accordingly, Nelson states no claim upon which relief may be granted, and given the vague nature of the allegations, amendment would be futile. See *Cato*, 70 F.3d at 1106. Therefore, it is recommended that the action be dismissed with prejudice.

IV. CONCLUSION

Consistent with the above, the court finds that dismissal is warranted under 28 U.S.C. § 1915(e)(2)(B)(ii). Because amendment would be futile, the dismissal should be with prejudice. See *Cato*, 70 F.3d at 1106.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Nelson's application to proceed *in forma pauperis* (ECF No. 1) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the Clerk **FILE** Nelson's complaint (ECF No. 1-1); and,

IT IS FURTHER RECOMMENDED that the complaint (ECF No. 1-1) be **DISMISSED WITH PREJUDICE**.

DATED: January 13, 2021.


UNITED STATES MAGISTRATE JUDGE